

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NILESH AND ANURADHA NAVLAKHA	:	DETERMINATION
		DTA NO. 820250
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the New	:	
York City Administrative Code for the Years 2000	:	
and 2001.	:	

Petitioners, Niles and Anuradha Navlakha, 500 East 77th Street, Apt. 1503, New York, New York 10162, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 2000 and 2001.

On August 3, 2005 and August 11, 2005, petitioners, appearing by Stoops & Company, LLC (Carl E. Stoops, CPA) and the Division of Taxation by Christopher C. O'Brien, Esq. (Michele W. Milavec, Esq., of counsel), respectively, waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by January 12, 2006, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly determined that petitioners are subject to tax as residents of New York State and New York City for tax years 2000 and 2001, on the basis that they maintained a permanent place of abode in New York State and New York City within the meaning of Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-1705(b)(1)(B).

FINDINGS OF FACT

1. Petitioners, Nilesh and Anuradha Navlakha, maintained a place of abode in New York during the years at issue, located at 500 East 77th Street, Apartment No. 1503, New York, New York 10162, and were present in New York for more than 183 days of each of the tax years in issue.

2. Petitioner Nilesh Navlakha attended the University of North Carolina at Chapel Hill and graduated in May 1996 with a masters degree in business administration with a specialization in finance. After his graduation, Nilesh Navlakha was employed by Morgan Stanley Dean Witter, Inc., and received wages from this company for the third and fourth quarters of 1996.

3. Nilesh Navlakha was subsequently employed by Socgen-Crosby Securities, Inc., and received wages from this company for the fourth quarter of 1996 and all four quarters of 1997. He was next employed by Societe Generale Securities Corporation (later known as SG Cowen Securities Corporation) and received wages from this company for the fourth quarter of 1997, and for all four quarters of 1998, 1999, 2000 and 2001.

4. Petitioner Anuradha Navlakha was not employed during the years in issue.

5. On September 22, 1997, Societe Generale Securities Corporation submitted correspondence to the U.S. Department of Justice, Immigration and Naturalization Service in

support of its petition to obtain an H-1B to H-1B Reclassification and H-1B Visa Petition Extension for Nilesh Navlakha. Although this correspondence requested a reclassification and extension of Nilesh Navlakha's H-1B visa, petitioner did not provide copies of any previously issued H-1B visas held while working for Morgan Stanley Dean Witter or Socgen-Crosby Securities during the years 1996 and 1997.

6. Petitioner Nilesh Navlakha did not include a copy of the visa obtained after the petition submitted by Societe Generale Securities Corporation in September 1997. The only information in the record regarding any of his visas is a copy of his H-1B visa valid from November 22, 2000 to March 11, 2003, sponsored by his employer, SG Cowen Securities Corporation. No information or documentation was provided with regard to any visas held by Anuradha Navlakha.

7. Petitioner Nilesh Navlakha did not submit any employment contracts, sponsorship letters in support of his visa applications, or any other information into the record regarding his employment with Morgan Stanley Dean Witter, Inc., and Socgen-Crosby Securities, Inc., during 1996 and 1997. The only information regarding petitioner's employment with SG Cowen Securities is the correspondence described in Finding of Fact "5," an employment letter from SG Securities dated May 9, 2000 and a one-page correspondence dated August 25, 2003 from petitioner to the New York State Department of Taxation and Finance, Income/Franchise Desk Audit Bureau, addressing his employment for 2000 and 2001.

8. The letter of employment from SG Cowen Securities, dated May 9, 2000, was an offer of the position of Co-Product Head, Indian Product at the Director Level. This was written approximately three years after petitioner Nilesh Navlakha was initially employed by SG Cowen.

9. The correspondence dated August 25, 2003 from petitioner Nilesh Navlakha gives the following explanation of his work history as it pertains to the years in issue:

During the years 2000 and 2001 I was employed by SG Cowen Securities, Asia to develop their Indian Equities business in the United States of America. My employment was for a specific period of time and there was a clear understanding that I would go back to Mumbai, India once I had established the credentials of the SG Cowen Securities Indian franchise in USA.

To be more specific, the nature of my work was to meet mutual fund managers in America and advise them about investing in the Indian markets. At the same time I was required to spend lengthy periods of time in India to recruit analysts and traders in my capacity as the head of the Indian product for SG Securities. As per my terms with my employer I was required to go back to India to head up the office there once contact was established with the large mutual funds in America and they had opened up accounts with our Indian office with the specific purpose of investing in the Indian equity markets.

I enclose my employment contract which will make it clear that my employment was for a period of two years (2000 and 2001) and that I was to relocate once this period was over. Part of my responsibility was also to recruit my replacement in the New York office. In 2003, my employer wanted me to relocate outside USA but I choose to stay back and as a result resigned from SG Cowen Securities. However, once I had decided that I wished to stay back in USA. I filed my 2002 return as a resident.

10. The September 22, 1997 letter of Societe Generale Securities Corporation (subsequently SG Cowen) described Mr. Navlakha's position with the company as a financial analyst, and set forth the following professional duties:

In this specialty occupation, Mr. Navlakha will be responsible for SGSC'S financial research and analysis of financial transactions and high-grade equity issues for the Indian sub-continent, including India, Pakistan and Sri Lanka financial markets. He will develop appropriate market research methodologies and analyses to evaluate market trends, developments and conditions. He will engage in the analysis and interpretation of research data including financial data-bases and financial trends to better predict market conditions, minimize financial risks and maximize revenues. He will perform financial analysis and due diligence studies of financial and statistical records of companies to ensure highest credit and investment standards. He will also evaluate and analyze financial data of all Indian sub-continent business transactions including investment strategy, pricing, yield and financial soundness. On the basis of his evaluation of current market conditions, Mr. Navlakha will develop financial

guidelines on Indian sub-continent business transactions including equity issues, financial terms, investment plans and revenue goals. Towards this aim, he will bring to bear his academic expertise as well as his analytical skills.

11. Petitioner Nilesh Navlakha filed a New York State Nonresident and Part-Year Resident Income Tax Return, Form IT-203, for tax year 1996 under the marital status “single,” using the address 540 West 122nd Street, Apartment 42, New York, New York 10027.

12. Petitioners jointly filed a New York State Resident Income Tax Return, Form IT-201, for tax year 1997, using the address 540 West 122nd Street, Apartment 42, New York, New York, 10027.

13. Petitioners jointly filed New York State nonresident and part-year resident income tax returns, Form IT-203, for tax years 1998 and 1999 using the address 540 West 122nd Street, Apartment 42, New York, New York 10027.

14. Petitioners filed a New York State Nonresident and Part-Year Resident Income Tax Return, Form IT-203, for tax years 2000 and 2001, on which they listed their address as 500 East 77th Street, Apartment 1503, New York, New York 10162, and requested a refund. The return included a statement which admitted that petitioners maintained an abode in New York State but claimed that petitioners were nonresidents of New York and that they were present in the United States for a temporary period to accomplish a particular purpose with the intention of returning to their home country, India, upon the termination of their assignment in the United States.

15. The Division of Taxation (“Division”) conducted an audit of petitioners’ 2000 and 2001 nonresident and part-year resident income tax returns. During the audit, the Division requested that petitioners provide a statement detailing the nature of the work assignment with SG Cowen and any other business wages earned in 2000 and 2001, a copy of any employment

contract with SG Cowen and any other business wages earned in 2000 and 2001, and a statement regarding visa status and a copy of the visas.

16. In response to the Division's request, petitioners provided the items described in Finding of Facts "8", "9", and "10", in addition to copies of the H-1B visa and passport of Nilesh Navlakha.

17. The Division reviewed the documents supplied by petitioners and thereafter issued statements of proposed audit changes, dated October 30, 2003, pertaining to the years 2000 and 2001. The notices explained that:

A review of your reply indicates that your assignment to New York State was for general duties and not for the accomplishment of a particular purpose as contemplated by Section 105.20(e)(1) of the Regulations.

Additionally, although your employment contract submitted for review states a two year duration, available information indicates that this was not your initial employment contract with SG Cowen and that you have been continually employed by more than one employer, in New York State since 1996: A stay involving varied, consecutive assignments would not qualify for the permanent place of abode exemption as defined in the Regulations.

18. The Division issued two notices of deficiency, Notice Nos. L-023158907 and L-023158931, dated December 26, 2003, to petitioners for the years 2000 and 2001, asserting additional tax in the amount of \$24,056.27 and \$26,208.73, plus interest, respectively.

19. The Division submitted 24 proposed findings of fact, all of which have been incorporated into this determination, except a portion of proposed finding of fact 20 which set forth the Division's position and its conclusion.

20. Petitioners did not submit any further documentation in support of their position or respond to the submission of evidence by the Division of Taxation.

SUMMARY OF THE PARTIES' POSITIONS

21. Petitioners contend that they met the conditions as defined in 20 NYCRR 105.20(e)(1) for a “temporary place of abode.”

22. The Division maintains that since Nilesh Navlakha’s stay in New York State in 1996, he has been employed by numerous employers and a stay involving varied consecutive assignments would not qualify for the permanent place of abode exemption pursuant to 20 NYCRR 105.20(e)(1). Further, the Division argues that petitioners have failed to prove they maintained the New York place of abode only for the accomplishment of a particular purpose.

CONCLUSIONS OF LAW

A. The issue in this proceeding is whether petitioners are subject to tax as residents of New York State and New York City. The classification is significant because nonresidents of the State are taxed only on their New York State source income whereas residents of the State and City are taxed on their income from all sources (Tax Law §§ 611, 631). To the extent pertinent to this matter, Tax Law § 605(b)(1)(B) defines a resident individual as one:¹

who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.

B. Here, the Division has not argued that petitioners were domiciled in New York City. Conversely, petitioners’ nonresident income tax returns listed an address in New York City and they have not questioned the assertion that they maintained a place of abode in New York City. Further, petitioners have not presented any evidence that they were in New York City for fewer

¹The definition of New York City resident is identical to the New York State definition of a New York State resident except for substituting the word “City” for “State” (New York City Administrative Code § 11-1705[b][1][B]).

than 183 days during each of the years in issue. Consequently, the only issue remaining is whether petitioners maintained a *permanent* place of abode in New York City.

C. The term permanent place of abode is not defined in the Tax Law. However, it is discussed in the regulations. The Commissioner's regulations at 20 NYCRR 105.20(e)(1) provide:

Permanent place of abode. (1) A permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. Furthermore, a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode. *Also, a place of abode, whether in New York State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose.* For example, an individual domiciled in another state may be assigned to such individual's employer's New York State office for a fixed and limited period, after which such individual is to return to such individual's permanent location. If such an individual takes an apartment in New York State during this period, such individual is not deemed a resident, even though such individual spends more than 183 days of the taxable year in New York State, because such individual's place of abode is not permanent. Such individual will, of course, be taxable as a nonresident on such individual's income from New York State sources, including such individual's salary or other compensation for services performed in New York State. However, if such individual's assignment to such individual's employer's New York State office is not for a fixed or limited period, such individual's New York State apartment will be deemed a permanent place of abode and such individual will be a resident for New York State personal income tax purposes if such individual spends more than 183 days of the year in New York State. The 183-day rule applies only to taxpayers who are not domiciled in New York State (emphasis added).

D. The issue presented is one of statutory construction. Previously, when construing this section of the regulations, the Tax Appeals Tribunal referred to the following rule set forth in ***Regan v. Heimbach*** (91 AD2d 71, 458 NYS2d 286, 287, *lv denied* 58 NY2d 610, 462 NYS2d 1027): "In statutory construction, commonly used words must be given their usual and ordinary meaning, unless it is plain from the statute that a different meaning is intended (citations

omitted)” (*Matter of Evans*, Tax Appeals Tribunal, June 18, 1992, *confirmed*, *Matter of Evans v. Tax Appeals Tribunal*, 199 AD2d 840, 606 NYS2d 404). Moreover, petitioner is required to prove that his interpretation of the statute is the only reasonable interpretation, or that the Division’s interpretation is unreasonable (*Matter of Blue Spruce Farms v. State Tax Commission*, 99 AD2d 867, 472 NYS2d 744, *affd* 64 NY2d 682, 485 NYS2d 526). These principles of statutory construction also apply to the interpretation of administrative regulations (*see, Matter of Cortland-Clinton, Inc. v. New York State Department of Health*, 59 AD2d 228, 399 NYS2d 492). It is well settled that the construction of statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld (*Matter of Howard v. Wyman*, 28 NY2d 434, 322 NYS2d 683). A reading of the regulation clearly indicates that a place of abode will be deemed temporary only if petitioners carry the burden of proving that their place of abode is not deemed permanent, i.e., that it was both maintained during a temporary stay *and* the stay was for the accomplishment of a particular purpose.

E. Petitioner Nilesh Navlakha argues that his presence in the United States, and the State and City of New York, during the periods in issue, was based entirely on temporary visas for alien workers issued to him by the U.S. Citizenship and Immigration Services as requested by his respective employers. He contends that at no time did either petitioner intend to remain permanently in the United States or in the State or City of New York. Without disputing the proposition that Mr. Navlakha’s visa status did not permit permanent residency in the United States, the fact that he applied to renew his visa gives some indication that it was not a fixed constraint on the length of the term of his employment.

The documentary evidence establishes that petitioners have been in New York since 1996 and are currently still in New York. Petitioner had multiple employers prior to his employment

with SG Cowen Securities Corporation, where he was employed for the years in issue. No documentation was provided to show that his initial employment in New York was for a fixed and limited period. The documentation shows that petitioner was offered the position of Co-Product Head, Indian Product at Director level in 2000 for SG Cowen Securities Corporation during the years at issue, having first started with the company as a financial analyst. The promotion suggests a career with SG Cowen Securities Corporation, rather than a position for a fixed and limited period. Although the letter of employment from SG Cowen Securities Corporation guarantees petitioner's employment with the company for a period of two years, it was to continue at will and does not specify an end or conclusion to support a limitation of time. Further the same letter of employment, dated May 9, 2000, suggests a new position with the company, implying different job responsibilities, than when Mr. Navlakha initially began working for SG Cowen Securities in 1997.

During petitioners stay in New York, it is undisputed that they maintained an apartment in New York City continuously from 1996 through 2004, based upon two addresses provided by petitioners on their New York State income tax returns, one of which was used during the years in issue. There is no evidence that the apartments were maintained for fixed and limited periods. Instead their use spanned nearly nine years, during Mr. Navlakha's different jobs involving varying lengths of employment. Clearly, there is no evidence of a temporary stay with specific parameters as to duration by a review of the facts concerning the New York City apartment used during 2000 and 2001.

F. In addition to being required to prove that the place of abode was maintained for only a temporary stay, petitioners must also prove that the place of abode was maintained only for the accomplishment of a particular purpose. Petitioners have not proven, and the record does not

support the conclusion, that they maintained their apartment in New York only for the accomplishment of a particular purpose during the years in issue (20 NYCRR 105.20[e][1]). The documentary evidence does not include employment contracts, job descriptions or evidence of specific assignments from Mr. Navlakha's various jobs prior to his employment with SG Cowen Securities Corporation. The documentation submitted in support of Mr. Navlakha's visa petition, the employment letter dated May 9, 2000, and the correspondence submitted by petitioners to the Division all fail to provide support for petitioners' claim of Mr. Navlakha's assignment to accomplish a particular purpose, in a fixed and limited time. The job duties described in the various documents are general and wide-reaching financial and business responsibilities and do not support the "particular purpose" requirement contemplated by 20 NYCRR 105.20(e).

It must be noted that the only argument set forth by petitioners was in their petition, and no evidence or supporting documentation was submitted thereafter. In this case, the evidence in the record taken in its entirety supports a conclusion that petitioners' stay was indefinite and not for the accomplishment of a particular purpose. Accordingly, petitioners failed to meet their burden of proof.

G. The petition of Nilesh Navlakha and Anuradha Navlakha is denied and the notices of deficiency, dated December 26, 2003, are sustained.

DATED: Troy, New York
June 29, 2006

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE